Supreme Court, U.S.
FILED
DEC 8 - 2003
OFFICE OF THE CLERK

(2)

No. 03-546

In the Supreme Court of the United States

PETER THOSTESON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether petitioner willfully failed to pay over to the United States the trust fund taxes withheld by Lorac, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 331 F.3d 1294. The opinion of the district court (Pet. App. 13a-20a) is reported at 182 F. Supp. 2d 1189. The order of the district court modifying its opinion (Pet. App. 21a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2003. The petition for rehearing was denied on July 9, 2003 (Pet. App. 24a). The petition for writ of certiorari was filed on October 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was one of the incorporators of Lorac, Inc., which engaged in an employee leasing business. Pet. App. 3a. Lorac entered into contracts with existing businesses under which it hired the employees of those businesses as employees of Lorac and then "leased" the services of those employees back to the clients. *Id.* at 6a. Under these "lease" agreements, Lorac agreed to undertake payroll services for its clients, including the filing of federal employment tax returns for withheld Federal Insurance Contributions Act (FICA) and employee income taxes and the payment of those taxes over to the government. *Ibid.* During 1995, Lorac had more than four thousand employees engaged in such "lease" transactions. *Id.* at 5a.

Petitioner initially worked as Lorac's vice president in charge of marketing. Pet. App. 3a, 8a. He also had joint authority with Garner Umphrey—who was then the company's president—to hire and fire employees, to pay suppliers, to determine financial policy, to set salaries and wages (including his own), to decide what to charge clients for payroll services, to choose insurance policies, to pay employees and to enter into loan agreements on Lorac's behalf. *Id.* at 3a, 8a, 17a-19a; Gov't C.A. Br. 6. Petitioner had sole check signing authority on three of Lorac's bank accounts. On other accounts, he had the authority to write checks for amounts up to $750 on his signature alone. Pet. App. 3a, 8a, 14a-15a; Gov't C.A. Br. 6-7. Petitioner had joint authority to write larger checks on these accounts with another co-signer. Pet. App. 14a-15a, 18a; Gov't C.A. Br. 7.

In the Spring of 1995, petitioner acquired a 24-percent share of the stock of Lorac from Garner Umphrey. For the third and fourth quarters of 1995, petitioner signed the federal withholding tax returns for Lorac as the "president" of the company. Pet. App. 3a-4a, 10a, 15a. In November, 1995, petitioner signed a bankruptcy petition for Lorac as its president. *Id.* at 5a-6a. The bankruptcy was eventually converted to a Chapter 7 liquidation proceeding, and Lorac ceased its business operations during 1997. *Id.* at 6a.

2. For the period that preceded the commencement of the bankruptcy case, Lorac owed the United States approximately $1.3 million in unpaid employment taxes —taxes that had been withheld from the wages of its employees during the third and fourth quarters of 1994 and all four quarters of 1995. Pet. App. 2a. When these amounts were not paid in the bankruptcy proceeding, the Internal Revenue Service made an assessment against petitioner and against Garner Umphrey under 26 U.S.C. 6672 in the amount of the unpaid trust-fund taxes, determining that they were both responsible persons of the corporation who had willfully failed to collect and pay over the employment taxes due the United States. Pet. App. 2a, 4a, 13a.[1] Petitioner paid a divisible portion of the assessment for each of the quarters assessed and filed claims for refund. *Id.* at 2a, 13a, 21a-22a. When the government denied the refund claims, petitioner filed this refund suit in federal district court. The government then filed a counterclaim for the unpaid remainder of the Section 6672 assessment. *Id.* at 13a, 21a-22a.

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[1] The court of appeals noted that Garner Umphrey "has also been sued by the government but has disappeared." Pet. App. 4a.

3. The district court held a jury trial. Pet. App. 13a, 22a. At the trial, petitioner testified that, throughout the entire period of his involvement with Lorac, he knew that employee withholding taxes are held in trust for the United States and that a responsible person has a duty to ensure that these withheld taxes are remitted to the government. *Id.* at 4a, 15a; Gov't C.A. Br. 9. He further testified that, from August 28, 1995, onward, he was aware that Lorac had substantial overdue payroll tax liabilities. Pet. App. 5a, 19a. Indeed, in August and September of 1995, petitioner co-signed three checks to the IRS for $30,000 each, in partial payment of these liabilities of Lorac. He was also aware, however, that Lorac had ceased making these payments and remained delinquent in its payroll tax obligations through September, October, and November, 1995. *Id.* at 2a, 5a.

Petitioner did not dispute at trial that, even though he knew that the payments to the IRS had ceased and that Lorac was still delinquent, he took no other steps to arrange for the payment of the trust-fund taxes. Pet. App. 5a. The undisputed evidence showed that, even after petitioner was fully aware of the trust-fund tax delinquencies of Lorac, he continued to write and to authorize numerous checks to other creditors—including checks payable to himself and to a business in which his wife was part owner. *Id.* at 4a, 10a, 15a, 18a-19a.

The jury rendered a verdict that petitioner was not liable for the assessment against him under 26 U.S.C. 6672. The district court, however, granted the government's timely motion for judgment as a matter of law under Fed. R. Civ. P. 50. Pet. App. 13a-20a.

4. The court of appeals affirmed. Pet. App. 1a-12a. Based on the undisputed facts of record, the court held that the government had presented "overwhelming

evidence" that petitioner was personally liable for the withheld federal trust fund taxes under Section 6672. Pet. App. 7a.

The court of appeals noted that, under the two-pronged test for liability under Section 6672, a person is liable for unpaid trust fund taxes if he is "(1) a responsible person (2) who has willfully failed to perform a duty to collect, account for, or pay over federal employment taxes." Pet. App. 6a (citing 26 U.S.C. 6672(a)). The court held that the undisputed facts showed that petitioner was responsible for paying over the withheld taxes, because petitioner was a corporate officer with authority to disburse corporate funds, to hire and fire employees, and to participate in all corporate decisions. During the relevant period, he also had a substantial ownership interest in the company. Pet. App. 3a-5a. The court noted that the fact that another officer may *also* have had liability as a responsible person did not preclude petitioner's liability under this statute, for it is well established that a company may have more than one responsible person. *Id.* at 7a-8a (citing *Thibodeau* v. *United States*, 828 F.2d 1499, 1503 (11th Cir. 1987)). The court also noted that petitioner had ample authority to make payments on corporate accounts, either in conjunction with Umphrey or on his own through a series of small checks on other accounts. Pet. App. 8a (citing *Gustin* v. *United States IRS*, 876 F.2d 485, 492 (5th Cir. 1989)).

The court of appeals next concluded that the undisputed facts established the second, or willfulness prong of the Section 6672 test. Pet. App. 9a-11a. Petitioner testified that, after he became aware of the trust-fund arrearages in August 1995, his attempts to pay them were suspended on the orders of Garner Umphrey. *Id.* at 9a. The court noted that this "Nuremburg defense"

has consistently been rejected by the courts. *Id.* at 9a-10a (citing *Brounstein* v. *United States*, 979 F.2d 952, 956 n.5 (3d Cir. 1992); *Roth* v. *United States*, 779 F.2d 1567 (11th Cir. 1986)). Moreover, the evidence showed that, during the period when he was aware of the unpaid trust-fund taxes, petitioner in fact authorized several payments of corporate funds to other creditors, including payments to himself and to a company partly owned by his wife. Pet. App. 10a-11a. The court held that this undisputed evidence was plainly sufficient under Section 6672 to establish that petitioner had "willfully" failed to pay over the withheld trust fund taxes as a matter of law. *Ibid.*

Finally, the court of appeals addressed petitioner's argument, based on *Finley* v. *United States*, 123 F.3d 1342 (10th Cir. 1997), that he had reasonable cause for his failure to pay over the trust-fund taxes. The court noted that the Eleventh Circuit had not decided whether a "reasonable cause" defense to Section 6672 liability would be available and that there was no reason for the court "to address this issue today." Pet. App. 11a. Instead, the court agreed with the Fifth Circuit in *Bowen* v. *United States*, 836 F.2d 965, 968 (1988), which held on similar facts that, even if a reasonable cause defense to Section 6672 liability exists, it would not be available to "a responsible person who knew that the withholding taxes were due, but who made a conscious decision to use corporate funds to pay creditors other than the government." Pet. App. 11a (citing *Bowen* v. *United States*, 836 F.2d at 968; *Newsome* v. *United States*, 431 F.2d 742, 746 n.11 (5th Cir. 1970); *Frazier* v. *United States*, 304 F.2d 528, 530 (5th Cir. 1962)). The court noted that, even in circuits that have recognized a "reasonable cause" defense under Section 6672, that defense has been confined to narrow fact

patterns that bear no resemblance to the undisputed facts of petitioner's case. Pet. App. 12a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Employers are required to withhold Federal Insurance Contributions Act (FICA) and federal income taxes from employees' wages and remit the withheld amounts to the Internal Revenue Service. 26 U.S.C. 3102(a), 3402(a). The funds withheld from employee wages are held in trust for the United States. 26 U.S.C. 7501(a); *Slodov* v. *United States*, 436 U.S. 238, 243 (1978); *Smith* v. *United States*, 894 F.2d 1549, 1552-1553 (11th Cir. 1990); *Howard* v. *United States*, 711 F.2d 729, 733 (5th Cir. 1983). Unfortunately, troubled businesses often find the trust funds they collect to be "a tempting source of ready cash" and they unlawfully use the money to pay creditors in an effort to keep the failing corporation in operation. *Slodov* v. *United States*, 436 U.S. at 243.

Congress enacted Section 6672 of the Internal Revenue Code, 26 U.S.C. 6672, to prevent this misuse of trust-fund taxes to prop up failing businesses. Under this statute, a individual is personally liable for the amount of unpaid trust-fund taxes if (i) he is "responsible" for collecting and paying over the tax; and (2) he "willfully fails to collect such tax, or truthfully account for and pay over such tax * * * ." 26 U.S.C. 6672(a). See, *e.g.*, *Winter* v. *United States*, 196 F.3d 339, 344 (2d Cir. 1999); *Plett* v. *United States*, 185 F.3d 216, 218-219 (4th Cir. 1999); *United States* v. *Kim*, 111 F.3d 1351,

1357 (7th Cir.); *Mazo* v. *United States*, 591 F.2d 1151, 1153 (5th Cir.), cert. denied, 444 U.S. 842 (1979).

Petitioner does not claim that he was not "responsible" for paying over the withheld taxes during the relevant periods. Instead, he claims (Pet. 9-15) that he did not "willfully" fail to do so. The term "willfully" as used in Section 6672 connotes "a voluntary, intentional violation of a known legal duty." See *Cheek* v. *United States*, 498 U.S. 192, 200 (1991) (quoting *United States* v. *Bishop*, 412 U.S. 346, 360 (1973)). For purposes of Section 6672, a person acts "willfully" when he pays other creditors with corporate funds while knowing that the trust fund taxes owed to the United States remain unpaid; the statute does not require any other showing of fraudulent intent or bad motive on the responsible person's part. See, *e.g.*, *Vinick* v. *Commissioner*, 110 F.3d 168, 173 (1st Cir. 1997); *Buffalow* v. *United States*, 109 F.3d 570, 573 (9th Cir. 1997); *United States* v. *Rem*, 38 F.3d 634, 643 (2d Cir. 1994); *Barnett* v. *IRS*, 988 F.2d 1449, 1457 (5th Cir.), cert. denied, 510 U.S. 990 (1993); *Williams* v. *United States*, 931 F.2d 805, 810 (11th Cir. 1991).

The undisputed evidence plainly establishes that, under this accepted standard, petitioner acted "willfully" by failing to pay over the withheld trust fund taxes in this case. During the period that petitioner was fully aware of the outstanding unpaid trust fund taxes owed to the United States, petitioner did not pay those taxes and, instead, paid other creditors including himself and his wife's company. Pet. App. 10a-11a. As the courts below concluded, these undisputed facts establish petitioner's liability under Section 6672 as a matter of law. *Ibid.*

2. Petitioner errs in claiming (Pet. 9-13) that the decision in this case conflicts with the decision of the

Tenth Circuit in *Finley* v. *United States*, 123 F.3d 1342, 1346-1348 (1997), which recognized a "reasonable cause" defense to Section 6672 liability. The court of appeals correctly and expressly declined to address the asserted "reasonable cause" defense to responsible person liability because that defense would be unavailable to petitioner even under the standards followed by circuits that recognize such a defense. Pet. App. 11a.

In *Finley*, a corporate president ordered the treasurer of the corporation to pay outstanding trust fund taxes and only discovered that his order had not been carried out when funds were no longer available to make the payment. 123 F.3d at 1343-1344. The Tenth Circuit held that these facts brought the president within a "reasonable cause exception" to Section 6672 liability. *Id.* at 1348. The court stated that this exception was to be "narrowly construe[d]" and would be confined to situations in which "(1) the taxpayer has made reasonable efforts to protect the trust funds, but (2) those efforts have been frustrated by circumstances outside the taxpayer's control." *Ibid.* Because the jury had not been instructed on "reasonable cause," the court remanded the case for a new trial. *Id.* at 1350.

The Second Circuit has recognized a version of the "reasonable cause" defense, stating that a responsible person may avoid liability if he shows that he reasonably believed that the trust-fund taxes were in fact being paid. *Winter* v. *United States*, 196 F.3d at 345. The First, Seventh, and Ninth Circuits, however, have refused to recognize a "reasonable cause" defense to Section 6672 liability. *Harrington* v. *United States*, 504 F.2d 1306, 1315-1316 (1st Cir. 1974); *Pacific National Ins. Co.* v. *United States*, 422 F.2d 26, 33 (9th Cir.), cert. denied, 398 U.S. 937 (1970); *Monday* v. *United States*, 421 F.2d 1210, 1216 (7th Cir.), cert. denied, 400 U.S. 821

(1970). In holding that no reasonable cause defense exists under Section 6672, the Seventh Circuit observed that such a defense would invite the fact finder to consider "misleading and improper factors" such as the business's financial difficulties, and would be "inconsistent with the purposes of Congress to protect the sources of revenue by permitting recovery from those individuals charged with the responsibility of transferring withheld funds to the Government." *Monday* v. *United States*, 421 F.2d at 1216. The First Circuit, in *Harrington*, agreed with the Seventh Circuit's reasoning, noting also that the use of "reasonable cause" language in other Code provisions (*e.g.*, 26 U.S.C. 6651(a)(1), 6652(a), 6656(a)) strongly indicates that the omission of that term in Section 6672 was deliberate. 504 F.2d at 1316.

The Fifth Circuit has "recognized conceptually" that a reasonable cause exception may exist but, as the court observed in *Bowen*, "no taxpayer has yet carried that pail up the hill." 836 F.2d at 968. See *Logal* v. *United States*, 195 F.3d 229, 233 (5th Cir. 1999) (responsible person who knew of failure to pay withholding taxes yet paid other creditors lacks any "reasonable cause"). In particular, the *Bowen* court held that a "reasonable expectation of sufficient funds at a later date"—based on assurances from a bank officer that the bank would give the company a loan to pay its trust fund taxes —would not constitute reasonable cause or negate Section 6672 liability. 836 F.2d at 968. See *Howard* v. *United States*, 711 F.2d 729, 736 (5th Cir. 1983) (an order from a superior not to pay a company's trust-fund taxes does not provide a reasonable cause defense).

The only "reasonable cause" that petitioner points to in this case (Pet. 13) is that Garner Umphrey assertedly overruled his efforts to make certain payments towards

the trust-fund tax liability. This incident falls far short of constituting "reasonable cause" even under the standards articulated by the circuits that may recognize such a defense. For example, in this case, unlike in *Finley*, 123 F.3d at 1349, petitioner knew that the taxes remained delinquent during the period that he authorized other uses of corporate funds. Pet. App. 4a. Moreover, here, unlike in *Finley*, even after knowingly suspending payments to the government, petitioner wrote checks on the corporate accounts to pay himself and other creditors of the corporation, including his wife's company. *Id.* at 3a-4a. Indeed, during the period from August to November 1995, when petitioner admits that he was aware of the continuing deficiency in the payment of the trust fund taxes, petitioner signed or co-signed at least 262 checks on the company's accounts. *Id.* at 5a, 10a. A "reasonable cause" exception clearly would not apply in the circumstances present in this case—where petitioner could have made substantial payments toward the trust-fund tax liability but chose not to do so.[2] See, *e.g.*, *Gustin* v. *United States IRS*, 876 F.2d at 492 (although responsible person had check-writing authority "limited to relatively small amounts," he was liable for his failure to exercise that authority to pay a portion of the trust-fund taxes and for dissipating the trust fund by paying other creditors); *Howard* v. *United States*, 711 F.2d at 736 (orders from a superior do not constitute "reasonable cause").

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[2] Similarly, the Second Circuit in *Winter* v. *United States*, 196 F.3d at 345, held that a responsible person who reasonably believed trust-fund taxes were being paid could escape liability. In this case, petitioner conceded that, even after he was aware of the unpaid liability, he continued to sign checks to pay other creditors. Pet. App. 4a-5a.

3. Petitioner also mistakenly argues (Pet. 14-15) that the decision in this case conflicts with *Ratzlaf* v. *United States*, 510 U.S. 135 (1994). *Ratzlaf* involved a provision of the Currency and Foreign Transactions Reporting Act (since revised) that provided criminal penalties for one who "willfully violate[s]" the act by structuring cash transactions to fall below reporting limits. 510 U.S. at 136-138; 31 U.S.C. 5322(a), 5324(a)(3).[3] The Court held that the "willfulness" element of this criminal offense requires the government to prove that the defendant knew that the restructuring was unlawful. 510 U.S. at 149. Petitioner asserts that, since Section 6672 was once a criminal statute and "retains its penal nature," *Ratzlaf* requires the courts to recognize a defense for responsible persons who make a "good faith effort" to pay trust-fund taxes. Pet. 14-15.

This argument fails because, as courts have repeatedly held, 26 U.S.C. 6672 is a civil, not a criminal statute. See, *e.g.*, *Vinick* v. *Commissioner*, 110 F.3d at 173; *Denbo* v. *United States*, 988 F.2d 1029, 1034 (10th Cir. 1993); *Kalb* v. *United States*, 505 F.2d 506, 510 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975); *Monday* v. *United States*, 421 F.2d at 1215 (contrasting the meaning of "willfulness" in civil and criminal statutes); *Emshwiller* v. *United States*, 565 F.2d 1042, 1045 (8th Cir. 1977); *United States* v. *Molitor*, 337 F.2d 917, 924 (9th Cir. 1964). Rather than punishment, Congress's purpose in enacting Section 6672 was to provide the government with an alternative source to collect trust fund taxes that have been withheld from, and credited

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[3] Congress amended 31 U.S.C. 5324 in 1994 to remove the reference to the "willfulness" requirement of Section 5322. Pub. L. No. 103-325, § 411, 108 Stat. 2253. See *United States* v. *Zehrbach*, 47 F.3d 1252, 1262 n.7 (3d Cir.), cert. denied, 514 U.S. 1067 (1995).

to, employees. *Slodov* v. *United States*, 436 U.S. at 243; *Winter* v. *United States*, 196 F.3d at 344; *Finley* v. *United States*, 123 F.3d at 1348; *Emshwiller* v. *United States*, 565 F.2d at 1045. Interpretations of the term "willful" as used in criminal statutes thus have little relevance to Section 6672. See, *e.g.*, *Monday* v. *United States*, 421 F.2d at 1215. Moreover, no appellate decision supports petitioner's contention and there is thus no conflict to warrant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2003